AUTHORITIES CITED

Cases	Page
Alford v. U.S., 282 U.S. 687	4
Dennis v. U.S., 16 L.ed.2d 973 (34 L.W. 4556)	4
People v. Ramistella, 306 N.Y. 379	4
Pointer v. Texas, 380 U.S. 400, 13 L.ed.2d 923	5, 7
Rothrock, In re, 14 Cal.2d 34	2
Roviaro v. U.S., 353 U.S. 53, 1 L.ed.2d 639	3
Silverthorne Lumber Co. v. U.S., 251 U.S. 385, 64 L.ed. 319	3
U.S. v. Andolschek, 142 F.2d 503	4
U.S. v. Coplon, 184 F.2d 629	4
U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150	4

Constitution

United States Constitution:	
Fourth Amendment	7
Fifth Amendment	7
Sixth Amendment	5

Miscellaneous

71 Harvard Law Review 141	4
8 Wigmore, Section 2374, p. 753	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 230

RAMONA CIPRES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Comes now Ramona Cipres and in answer to the opposition of the government to her petition for writ of certiorari, respectfully sets forth as follows:

I

The Solicitor General has erroneously set forth facts in his reply and has picked up an error of fact in the opinion of the Court of Appeals for the Ninth Circuit which that Court failed to correct on rehearing. The government states erroneously that "They (the officers) had ample reason to believe that the luggage about to

be placed on an airplane and hence in transit contained contraband." Where a court acts under a mistake of fact a hearing should be granted. Courts have even recalled remittiturs after judgment when the court below acted under a mistake of fact. *In re Rothrock,* 14 Cal.2d 34.

The officers had nothing on which to base any reason to believe there was any contraband in the luggage until they made an unlawful search of the luggage prior to the arrest of the appellant by squeezing the sides of the luggage and smelling its contents.[1] Such procedure has been denominated a search—an illegal search. It was only this unlawful search that enabled them to cause the arrest of the petitioner. Nor was there anything that the petitioner did that showed she had any guilty knowledge of the contents of the suitcases. They

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[1] "Q. (BY MR. VAN DE KAMP) When was the first time you touched one of the bags?

"A. Approximately 2 minutes after joining Sergeant Beckmann and the defendant Cipres and after having heard part of the conversation.

"Q. And following that conversation, which bag did you go to?

"A. As I recall, I went to the one over on the counter.

"Q. What did you do with that bag?

"A. I depressed the sides of the bag and placed my nose near the seam of the bag and gave it what we call the smell or odor test, and at that time I smelled the odor of what I believed to be marijuana.

"Q. Had you smelled marijuana on previous occasions?

"A. Yes.

"Q. How many previous occasions had you smelled it?

"A. Several hundred. (R. 22, Transcript of May 18, 1965)

* * *

(Continued)

had been brought to the airport by someone else. The particular marijuana had been stored in the garage of Manuel Angel Gonzales September 2 or 3, 1963.

In *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 64 L.ed. 319, this Court said:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

II

At the hearing on petitioner's motion to suppress the evidence, petitioner sought to learn the name of the informant which the government claimed was the source of its information. The government declined to reveal the name of its claimed informant. *Roviaro v. U.S.*, 353 U.S. 53, 1 L.ed.2d 639; 8 Wigmore Section 2374, p. 753;

"THE COURT: Does marijuana have a peculiar odor or smell?

"THE WITNESS: Well, I would say that it has an odor of its own. That's the only way I can describe it.

"THE COURT: It smells different than any other narcotic?

"THE WITNESS: Yes, it does.

"THE COURT: And you were able to detect this particular odor, is that right?

"THE WITNESS: That is correct, your Honor.

"THE COURT: Were you able to detect the odor before you compressed the sides of the bag?

"THE WITNESS: No, I was not.

"THE COURT: So you went up to the counter and pushed in the side of the bag and then you detected the odor, is that right?

"THE WITNESS: That is correct." (R. 23-24, Transcript of May 18, 1965)

71 Harvard Law Review 141. The court sustained the government's objection to revealing the name of the informant.

It is respectfully submitted that the court abused its discretion.

In *Dennis v. U.S.*, 16 L.ed.2d 973 (34 L.W. 4556), this Court held that there are broadening rules of criminal discovery. In that case the Court said, quoting from *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234, "that the Court acknowledged that 'after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.'"

The Court, also referring to criminal discovery, pointed out that it is reflected in the expanding body of material, judicial and otherwise, favoring disclosure in criminal cases analogous to civil practice.

This Court also quoted in a footnote *Alford v. U.S.*, 282 U.S. 687, where this Court reversed a trial court's ruling which deprived defense counsel of an opportunity to inquire into the background of an important government witness; *United States v. Andolschek*, 142 F.2d 503, 506, where it was held the government must produce reports — otherwise privileged — upon which the prosecution was based; *U.S. v. Coplon*, 184 F.2d 629, 636-639; and, again, *People v. Ramistella*, 306 N.Y. 379, where the court ruled the State could not use evidence of a secret identification on an automobile to prove that the automobile was stolen where it was unwilling to disclose the location of the identification mark to the defense.

Likewise, here, the identification of the informer, whether he was reliable, on what he based his claimed knowledge of any of the defendants or their activities, or whether there was any knowledge by the persons involved

as to the defendant Cipres, were essential and necessary to a fair determination of this case, and it was error to deny petitioner this right unless the government was willing to dismiss the case against petitioner herein. The Sixth Amendment requires confrontation, denied when the hearsay of the informer is relied on and not subject to cross-examination.

Pointer v. Texas, 380 U.S. 400, 13 L.ed.2d 923.

Furthermore, the informer's information would have proved that the marijuana in the suitcases was not that referred to by him, nor was it established as having been illegally transported in interstate commerce.

III

The Solicitor General states in his brief:

> "Furthermore, the information that the customs agent obtained from the unidentified informer was fully corroborated. [However the defense had a right to cross-examine.] From sources independent of the informer the agents had learned of the scheme of the de Oca brothers, and one agent had overheard a conversation between the intended receivers in which they disclosed the date and time of the ship-

ment. [This is an error of fact.][2] The 'likelihood that * * * [petitioner] would have used the informant had the name been disclosed, and that the strong showing of probable cause could then have been dissipated, is thin almost to the point of non-existence.' "

The conversation referred to by the Circuit Court, and again by the Solicitor General in his brief to this Court, was in no way connected with the marijuana seized in this case. A re-examination of the evidence will show that the marijuana seized in the suitcase or bag at the airport had been in the United States for several weeks and had been stored in the garage of one Manuel Angel Gonzales and was not the marijuana referred to by the court in its opinion nor referred to in the conversation

[2] The record discloses that one Manuel Angel Gonzales, a former Cuban, coming to the United States in 1960, allowed Oscar de Oca to store suitcases in his garage in October, 1962 (R. 23), also a big cardboard box. (R. 29) On September 8 (1963) Gonzales had a conversation with Juan de Oca. They went to Gonzales' garage and de Oca told Gonzales the suitcases contained marijuana and that he was in the business. (R. 41) It was these suitcases that were taken to the airport on the night of September 17, 1963. On that night Gonzales met Juan de Oca about 8:15 p.m. and allowed de Oca to use his car. Juan de Oca took the car, saying he was going to drive to the airport. (R. 34) The car arrived about ten minutes to ten and a man got out and took the suitcases out of the car, which the porter took.

The alleged overheard conversation at the Blair House on September 17, to which the court below referred and which is again referred to in the Solicitor's brief, referred to a shipment that day, not the two suitcases which had been stored in Gonzales' garage for some time. This purported conversation related to a supposed shipment not yet arrived and not involved in this case. (Transcript of May 18, 1965, R. 40)

Obviously, the conversation related to a shipment not yet received and in no way related to the two suitcases involved in the instant case. As a matter of fact, the record fails to disclose whether the marijuana in question was in transit other than from Gonzales' garage to the airport and where it came from.

allegedly overheard and in the information furnished the Custom's agents from the unidentified informer. Cross-examination of the informer could have proved this.

Furthermore, if, as it was claimed, the unidentified informer was fully corroborated, the original information which he allegedly supplied should have been subject to confrontation and cross-examination.

Pointer v. Texas, 380 U.S. 400, 13 L.ed.2d 923

WHEREFORE, petitioner respectfully prays that this Court grant certiorari under its supervisory powers of criminal justice: (1) because the Circuit Court of Appeals acted under a mistake of fact which requires this Court to correct; (2) because the opinion of the Court of Appeals is in conflict with this Court's decisions on unlawful searches and seizures and the Fourth and Fifth Amendments, U.S. Constitution; (3) identity of an informer and the right to cross-examine such an informer is a constitutional right; (4) upon the lack of proof by the government of any guilty knowledge on the part of this young Spanish girl, who it was not shown had any knowledge of the contents of the bags that were taken to the airport by someone else and searched and seized without a search warrant in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

Respectfully submitted,

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